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THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH

North Brevard County Hospital District D/B/A Parrish Medical Center, *Plaintiff*, v. **C. R. Bard, Inc.; Bard Access Systems, Inc.,** *Defendants*.	**Defendants' Response to Plaintiff's Notice of Class Supplemental Authority** Case No. 2:22-cv-00144-RJS-JCB Assigned to: Chief Judge Robert J. Shelby Referred to: Magistrate Judge Jared C. Bennett

Bard submits this response to Parrish's Notice of Supplemental Authority (ECF No. 179), in which Parrish cites selectively from *National ATM Council, Inc. v. Visa Inc.*, 2023 WL 4743013 (D.C. Cir., Jul. 25, 2023). *Visa* underscores that the Court should deny Parrish's motion for class certification and exclude the opinions of Parrish's expert Dr. Miravete.[1]

- **Class Opp. (ECF No. 158) at 21, *Daubert* Reply (ECF No. 173) at 1-3 (Plaintiff must present a reliable methodology capable of proving with common evidence that every class member suffered injury).**

    o *Visa*: "[T]he court's review of the evidence comports with Supreme Court holdings that require district courts to closely review the record at the class certification stage—and thereby to ensure that plaintiffs provide a reliable method for establishing class-wide injury . . . , that is tied to plaintiffs' theory of liability . . . , and complies with our precedent *requiring that statistical models offered by plaintiffs show all class members suffered some injury*. In its analysis, the district court confirmed that each group of plaintiffs cleared those hurdles." 2023 WL 4743013, at *6.

    o *Visa*: "[Plaintiffs'] evidence showed that *all or virtually all class members . . . pay higher [access fees] than they would without the Access Fee Rules*." *Id.* at *8.

    o *Visa*: "[T]he *Burke*, *Mackmin*, and ATM Operator Plaintiffs satisfied Rule 23(b)(3) by providing reasonable, wholesale methodologies, tethered to Plaintiffs' respective

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[1] *See* Defendants' Opposition to Plaintiff's Renewed Motion for Class Certification (ECF No. 158) ("Class Opp."); Defendants' Motion to Exclude the Report and Testimony of Eugenio Miravete (ECF No. 156) ("*Daubert* Motion"); Defendant's Reply Memorandum in Support of Motion to Exclude the Report and Testimony of Eugenio Miravete (ECF No. 173) ("*Daubert* Reply"). Unless otherwise noted, all emphasis is added and internal quotations and citations are omitted.

theories of liability, *showing that all class members suffered injury*." *Id.* at *11.

- ***Daubert* Reply (ECF No. 173) at 3 (Court may probe merits issues where necessary to determine whether plaintiff met Rule 23 requirements).**

    o *Visa*: "The rigorous analysis a district court is required to conduct in support of its certification order sometimes involves probing the merits of plaintiffs' claims, which the Supreme Court has made clear is permissible insofar as necessary to ensure that the Rule 23 requirements are met." *Id.* at *5.

- ***Daubert* Motion (ECF No. 156) at 10-14 (Benchmarks must be comparable).**

    o *Visa*: "Yardstick analysis computes antitrust damages by comparing the prices paid by plaintiffs with those paid by a consumer in *a comparable market* unaffected by the antitrust violation." *Id.* at *7.

- **Additional contextual language for Parrish's quote that the district court is "not required at class certification to make the ultimate determination which of two dueling experts to accept."**

    o *Visa:* "Defendants challenge the *Mackmin* and *Burke* Plaintiffs' evidence by offering their own expert's reconfiguration of the *Mackmin* statistical model. That challenge does not point to internal flaws in either the *Mackmin* Plaintiffs' statistical model or the *Burke* Plaintiffs' distinct industry-wide tax model. Defendants have simply offered their own, contrasting model and argued that because their model treats some members in the *Mackmin* and *Burke* classes as uninjured, predominance is . . . lacking here." *Id.* at *11. Unlike in *Visa*, Bard's expert has not offered merely a competing model, but has presented a critique of the reliability of plaintiff's expert's analysis.

September 6, 2023
New York, New York

/s/ *Andrew J. Frackman*

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CERTIFICATE OF SERVICE

I hereby certify that on September 6, 2023 I caused the foregoing to be electronically filed with the Clerk of the Court using CM/ECF, which will send notifications of such filing to all registered participants.

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/s/Andrew J. Frackman
Andrew J. Frackman

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